January 6, 2012

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RE: Draft Opinion: Authority to Construct a New Elementary and Junior High School Using Multiple Funding Sources

Dear Jennifer:

Please accept this letter as the Montana School Board Association's comments and concerns regarding the draft opinion received by this office requesting comments by January 13, 2012, on the authority of the Ennis School District to construct a new elementary and junior high school using multiple funding sources. After having an opportunity to review and analyze the draft opinion, we do have significant concerns with the preliminary analysis and conclusions reached in the draft opinion as it has far reaching and likely unintended implications for our member public schools throughout the state.

At the onset, it is important to point out MTSBA was not asked to and did not provide any advice to Ennis Public Schools regarding their construction project and/or the method of paying for the construction of their new elementary and junior high school. It is equally important to note that we have taken no position on the relative merits of Ennis Public Schools' decisions that are the subject of this draft opinion. One of MTSBA's core values is support for community ownership and local control and we believe that the relative merits of Ennis Public Schools' decisions are best left to those most familiar with such decisions, which we believe to be the board of trustees of Ennis Public Schools, their key staff and the community they serve.

We are aware that the Office of Public Instruction (OPI) issued an opinion on August 16, 2010, at the request of the Madison County Attorney's Office, holding that the method of funding the new elementary and junior high school as described in the draft opinion met the legal requirements for the transfer and expenditure of those funds. The decision rendered by OPI in August of 2010 did not represent any shift in the law. To the contrary, the opinion is consistent with OPI's long-standing interpretation and validation of school districts' use of adult education funds for capital expenditures as more fully explained below. Importantly, that opinion was issued when the construction process in Ennis Public Schools was just beginning and, to our knowledge, Ennis Public Schools proceeded with demolition and construction, at least in part, in

reliance on the opinion rendered by OPI. We are in agreement with Deputy Superintendent of Public Instruction Dennis Parman's analysis and I am attaching OPI's August 16, 2010, opinion regarding this matter for your review.

The Draft Opinion Contradicts OPI's Past Practice and Official Interpretation of Applicable School Funding Statutes and OPI / Local School Board Authority Over Administration of School Finance Laws

Because the draft opinion would hold that there is an absolute prohibition on use of adult education funds for capital projects, the necessary implication is that schools are prohibited from using the adult education fund for ***any*** capital costs, including but not limited to maintenance and/or repairs of buildings, utilities costs, etc., directly associated with a school's adult education program. This holding, if finalized, would flatly contradict the consistent past practice of OPI in validating capital expenditures as an appropriate category of spending within the adult education fund. OPI has specific codes and descriptions (e.g. property and equipment acquisition) under which it has received, compiled and reported data, without objection, from a number of school districts who have used adult education funds to pay for capital costs over the years. *See e.g., OPI expenditure data files for fiscal years dating at least back to FY1994, which are maintained in the school finance section of OPI's website.*

Put simply, the draft opinion would overrule years of precedence of the state agency charged with general supervision of school finance in Montana and years of common practice by school districts throughout Montana over the last 20 years. The Montana Supreme Court has made it clear that in cases like this "deference must be given to the interpretations given the statute by the officers and agencies charged with its administration." *St. v. Midland Materials Co., 204 M 65, 662 P2d 1322, 40 St. Rep. 666 (1983).* See also *Mont. Contractors' Ass'n, Inc. v. Dept. of Highways, 220 M 392, 715 P2d 1056, 43 St. Rep. 470 (1986), followed in Albright v. St., 281 M 196, 933 P2d 815, 54 St. Rep. 132 (1997). Albright was followed in Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999); St. v. Wood, 205 M 141, 666 P2d 753, 40 St. Rep. 666 (1983; Christenot v. St., 272 M 396, 901 P2d 545, 52 St. Rep. 749 (1995) -- An administrative agency's interpretation of a statute under its domain is presumed to be controlling.*

In the case of *Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services,* 2002 MT 131, 310 M 156, 49 P3d 560 (2002), the Montana Supreme Court went on to hold that, "When an agency's interpretation of an administrative rule or statute has stood unchallenged for a considerable length of time, it will be regarded as having great importance in arriving at the proper construction." *Glendive Medical Center, Inc.,* at *¶14.* In this case, OPI's interpretation has stood unchallenged since at least 1994, as documented in expenditure files maintained by OPI and as further referenced in greater detail later in this letter.

Under the holdings referenced above, it is not only OPI but boards of trustees throughout the state whose interpretations of these laws are entitled to deference as both OPI and local school boards have clear statutory authority and roles relating to the administration of school district funds. Relevant provisions of Montana law vesting both OPI and local boards of trustees' with authority to administer school finance laws include the following:

OPI's Statutory Authority Over Administration of School District Funds

20-3-106. Supervision of schools -- powers and duties. The superintendent of public instruction has the general supervision of the public schools and districts of the state and shall perform the following duties or acts in implementing and enforcing the provisions of this title:
(6) generally supervise the school budgeting procedures prescribed by law in accordance with the provisions of 20-9-102 and prescribe the school budget format in accordance with the provisions of 20-9-103 and 20-9-506;
(9) generally supervise the school financial administration provisions as prescribed by 20-9-201(2);

20-9-102. General supervision of school budgeting system. The superintendent of public instruction has general supervision over the school budgeting procedure and provisions, as they relate to elementary and high school districts, prescribed by law and shall establish such rules as are necessary to secure compliance with the school budgeting laws.

20-9-103. School budget form. (1) The format of the school budget form shall be prescribed by the superintendent of public instruction and shall provide for proper school budgeting procedures in accordance with the budgeting requirements of this title and generally accepted accounting principles. . . .

20-9-201. Definitions and application
* * *
(2) The school financial administration provisions of this title apply to all money of any elementary or high school district. Elementary and high school districts shall record the receipt and disbursement of all money in accordance with generally accepted accounting principles. The superintendent of public instruction has general supervisory authority as prescribed by law over the school financial administration provisions, as they relate to elementary and high school districts. The superintendent of public instruction shall adopt rules necessary to secure compliance with the law.

Local Boards of Trustees' Authority Over Administration of School District Funds

20-3-324. Powers and duties. As prescribed elsewhere in this title, the trustees of each district shall:
* * *

(8) adopt and administer the annual budget or a budget amendment of the district in accordance with the provisions of the school budget system part of this title;
(9) conduct the fiscal business of the district in accordance with the provisions of the school financial administration part of this title;
* * *
(11) establish, maintain, budget, and finance the transportation program of the district in accordance with the provisions of the transportation parts of this title;
* * *
(13) when applicable, establish, financially administer, and budget for the tuition fund, retirement fund, building reserve fund, adult education fund, nonoperating fund, school food services fund, miscellaneous programs fund, building fund, lease or rental agreement fund, traffic education fund, impact aid fund, interlocal cooperative fund, and other funds as authorized by the state superintendent of public instruction in accordance with the provisions of the other school funds parts of this title;

20-9-213. Duties of trustees. The trustees of each district have the authority to transact all fiscal business and execute all contracts in the name of the district. A person other than the trustees acting as a governing board may not expend money of the district. In conducting the fiscal business of the district, the trustees shall:
(1) cause the keeping of an accurate, detailed accounting of all receipts and expenditures of school money for each fund and account maintained by the district in accordance with generally accepted accounting principles and the rules prescribed by the superintendent of public instruction. The record of the accounting must be open to public inspection at any meeting of the trustees.
(2) authorize all expenditures of district money and cause warrants or checks, as applicable, to be issued for the payment of lawful obligations;
(3) issue warrants or checks, as applicable, on any budgeted fund in anticipation of budgeted revenue, except that the expenditures may not exceed the amount budgeted for the fund;

Under both the Montana Constitution and the statutory framework referenced above, local school boards adopt and oversee their budgets, which includes setting levies and determining appropriate expenditures under each fund. School districts also frequently rely upon the information and advice from OPI pertaining to financial administration of school district funds because OPI is statutorily vested with general supervision of school finance and related matters.

If state agencies other than OPI (the agency statutorily charged with general supervision of Montana's public schools), second-guess or overturn a long-standing practice and/or interpretation of law by OPI, all public schools in this state will be at risk for being challenged without any protections long after seeking input from OPI and/or long after funds have been expended. The inequities in this approach to providing schools with guidance on financial

administration of school district funds are obvious. The issues being raised now with Ennis Public School's use of funds for its new elementary and junior high school, long after OPI issued its opinion, would have the practical effect of punishing Ennis' use of both adult education and transportation funds after they sought and obtained an official opinion of OPI that such expenditures were lawful.

In addition, the draft opinion disregards the role of elected trustees under Article X, Section 8, of the Montana Constitution. Article X, Section 8, of the Montana Constitution, provides as follows:

> **Section 8. School district trustees.** The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

The framers of the Montana Constitution intended Article X, Section 8, of the Montana Constitution to put local boards of trustees on equal footing with the powers provided to the Board of Regents over higher education. To illustrate the framers intention, the following is an excerpt from the Constitutional Convention Notes, Volume VI, Page 2046, whereby Delegate Heliker of Missoula, introduced new language providing for what is now Article X, Section 8 of the Montana Constitution:

> "I was generally aware before, I suppose, if I thought about it much-that there is grounds for concern of-concerning the autonomy of the local control, the local school boards, as financing of the schools gravitates toward the state more and more and as we see in the future the increasing likelihood that it-there will be a continuation of that trend. And the fear has been expressed here on-in this committee, when we were discussing these matters previously, that the local school boards would lose autonomy as they lost their control over the funds, if they do. Now, this committee has not provided, I notice, for autonomy in the Constitution for local school boards, although that autonomy is provided in the statutes which make the local school boards bodies corporate. At the same time, however, the committee proposal in Section 11 provides for autonomy to a certain extent for the Board of Regents, which they propose to establish as a constitutional board. And I feel, therefore, that we should give constitutional recognition and status to the local boards to-first of all, to allay the fears which have been expressed, which I think are well founded, concerning the preservation of local autonomy; and secondly, to give parallel treatment to the governing boards of the public schools, as well as the public universities and colleges. Thank you, Mr. Chairman."

Volume VI, Page 2046, Constitutional Convention Notes, Delegate Heliker.

Delegate Heliker's stated interpretation of Article X Section 8 went unchallenged. In fact, all those who spoke out on the motion to add this language spoke in support of the addition. So, there is clear intent by the framers of the Montana Constitution to empower local school boards with constitutional autonomy in their governance of local school districts.

To summarize our initial concerns, the draft opinion fails to recognize the required deference that must be provided to both local boards of trustees and OPI in interpreting school finance laws. Local school boards are constitutionally charged with the supervision and control of local schools and have the authority to expend funds consistent with Montana law. The financial administration provisions of Title 20, Chapter 9, MCA, pertaining to budgeted funds require local school boards to adopt a budget and constrain their spending according to such budget. Ennis complied with these requirements, as validated both by its auditor and by official opinion of OPI. Likewise, OPI is statutorily charged with general supervision over Montana's public schools and has general supervisory authority over public school financial administration. OPI was asked for an opinion regarding both the method of funding and the funding sources used for the construction of its new elementary and junior high school and found that Ennis met the spirit and intent of the financial administration provisions of Montana law. That finding was consistent with long-standing interpretations of school finance laws by OPI.

In addition to the significant, threshold concerns expressed above, our additional concerns with the legal analysis in the draft opinion are set forth below:

The Draft Opinion is in Error in Concluding that Adult Education Funds Cannot be Used for Capital Improvements

As a preliminary matter, based upon the information contained in your letter, "the District's auditor indicates the following uses of the new building based on a percentage of overall square footage: adult education (49%), K-8 education (36%) and transportation (15%)." The draft opinion does not challenge this fact.

The draft opinion that adult education money cannot be used, under any circumstances, for capital improvements is misplaced and based on reasoning that is internally inconsistent and would require school districts to violate the very principles of law cited in the opinion by subsidizing adult education programs with other funds designated for other purposes.

Specifically, in Paragraph 11 of the draft opinion, you conclude that Ennis appropriately transferred funds from the adult education fund to the flex fund for the purposes described in § 20-7-702, MCA. You go on to opine, however, that *"because those purposes do not include capital expenditures, transferred property taxes may only be used for adult education programming and not for new school construction."*

In clarifying your position, you conclude in Paragraph 15 that the reference in § 20-7-702, MCA, to providing an adult education program "at any time of the day when facilities and personnel are available," implies that any adult education program would need to be provided in an existing facility previously approved by voters and committed to other uses, thus unreasonably restricting the public schools in this state to provide adult education programs in facilities improved or renovated for adult education purposes with funds raised with and without voter approval for other purposes. That is the very type of action that the draft opinion claims violates the law. If the purpose of creating specific silos for expenditures is to prohibit a district from raising money

for one purpose and spending for another, that principle of law would apply equally to the subsidizing of, rather than by, Adult Education programs.

If you apply the conclusion reached by your office in Paragraph 15 that "adult education will be provided in an existing facility" without any additional capital outlay by the District using adult education funds, you would also have to apply the same rationale to the term "personnel" which would require that any school district operating an adult education program do so using exist personnel without the authority to hire additional personnel or compensate existing personnel for additional duties associated with the provision of adult education. This would require school districts to provide adult education with personnel with other specified duties paid with other sources of revenue dedicated for other purposes.

Likewise, this assertion would require that public schools in this state use funds that are specifically designated for other purposes to be spent on updating and improving facilities used in whole or in part for adult education programming, thus violating the very provision (§ 20-9-201, MCA) that you cite in the draft opinion for the proposition that schools must abide by statutory segregations of school funds and use funds for allowable specific purposes set forth in the description of the fund in question.

The provisions in Title 20, chapter 7, MCA, specific to the provision of adult education do not prohibit the use of adult education funds for capital improvements. In fact, a stronger argument is that those provisions explicitly authorize such expenditures. Section 20-7-705(4), MCA, provides as follows:

> (4) Whenever the trustees of a district decide to offer an adult education program during the ensuing school fiscal year, they shall budget for the **cost of the program** in the adult education fund of the final budget. **Any expenditures in support of the adult education program** under the final adult education budget must be made in accordance with the financial administration provisions of this title for a budgeted fund. Emphasis added.

Using common rules of statutory construction, there is at the very least an implied authority and certainly no express prohibition on a school district's allocation of capital costs of construction or renovation to the adult education fund. *See Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994)* -- Rules of statutory construction – to simply ascertain and declare what is contained in the section's terms and substance without inserting what has been omitted. See also *Yunker v. Murray, 170 M 427, 554 P2d 285 (1976); Keller v. Smith, 170 M 399, 553 P2d 1002 (1976)* -- When the result of one among alternative possible interpretations of a constitutional provision is unreasonable, the interpretation is in favor of another which would produce a reasonable result. In fact, the plain language contained in §§ 20-7-702 and 20-7-705, MCA, expressly contemplates that a school district can use adult education funds for ***any expenditure*** in support of the adult education program, which would include expenditures on facilities.

Resorting to an analysis of legislative intent as suggested in the preliminary opinion is not even necessary as an examination of legislative intent should be restricted to situations in which the

language of the statute is ambiguous. See, e.g. *Lovell v. St. Comp. Mut. Ins. Fund*, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993); *St. v. Zabawa*, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), both holding that the rules of statutory construction require a statute to be construed according to its plain meaning and specifying that resorting to interpretations of legislative history are to occur only when legislative intent cannot be determined by the plain wording of the statute. The plain language of the statutes in question is not ambiguous. The law specifically authorizes and even requires schools to budget for and categorize "***any expenditure***," which by plain language means "any," as in operational, capital or any other expenditure that is for the purposes of supporting the adult education program of a school district.

Additionally, even if interpretation of legislative intent is in order as outlined in the draft opinion, there is no indication in the draft opinion that the Attorney General's office has reviewed any legislative history in determining such intent. We have done so and have found that the legislative history dating back to 1971 when the language in question was first drafted, is void of any hint or suggestion that when the adult education statutes were recodified in 1971 (which contained the same broad "any expenditure" language that currently exists in statute) there was any intent to restrict the use of adult education funds for capital improvements.

Assuming for the sake of argument that a review of legislative intent is appropriate and that such intent can be derived without any reference to the Legislature's own expressions of intent as found in the applicable legislative history, the draft opinion is overreaching in interpreting that the Legislature intended a restriction on use of adult education funds for capital projects.

In Paragraph 16 of the draft opinion, you state that many of the funds described in Title 20, chapter 9, MCA, including the building reserve fund, require voter approval. You fail, however, to note that there are other statutes that specifically authorize schools to raise funds ***without*** a vote for capital projects. Section 20-9-471, MCA, for example, allows a district to issue and sell obligations to the board of investments to finance vehicles, equipment and the cost of renovating, rehabilitating and remodeling facilities as long as they can accommodate the debt service obligation from a legally available fund and comply with the provisions stated therein. That section even allows for expenditures (with limits) on new construction and purchases of real property, both without a vote. Another example of the authority of school districts to expend funds on capital projects without a vote of the taxpayers is § 20-6-621(1)(b), MCA, which allows the trustees to purchase or otherwise acquire property contiguous to an existing site that is in use for school purposes without an election.

The draft opinion concludes that if schools can use non-voted property taxes for capital investments, the use of adult education funds for capital construction would nullify the legislature's objective for taxpayer oversight in cases involving capital expenditures. As referenced immediately above, however, there is no uniform rule of law in Title 20 when it comes to whether capital expenditures need be approved by the voters. In some cases, voter approval is specifically required. In other cases, voter approval is specifically not required. In yet other cases, the law is silent but authorizes collection and expenditure of property taxes for a particular purpose (e.g., adult education, bus depreciation, transportation, employee benefits under the countywide retirement levy) without any requirement of voter approval. This is hardly

the clearly articulated and unequivocal rule that the draft opinion concludes exists under the provisions of Title 20.

In summary, schools cannot operate an adult education program without having a facility in which to operate such a program and without having staff to provide the programming. The adult education provisions in Title 20, chapter 7, expressly authorize and even require trustees to incorporate **any expenditure** in support of an adult education program into the budget for that fund, which would include costs allocated for facilities in which to operate an adult education program. There is nothing in law that prohibits a school district from using adult education funds for capital expenditures. As such, the analysis and conclusions reached in the draft opinion are not supported by current law. Likewise, the analysis and conclusions reached in the draft opinion are not supported by legislative intent nor OPI's interpretation and application of the laws pertaining to the use of adult education funds.

The Analysis and Conclusions Reached in the Draft Opinion on the Use of Transportation Funds are in Error

In Paragraph 20 of the draft opinion, you state that "Unlike the adult education statutes, the transportation statutes specifically authorize funding sources to be used for capital investments and expenditures, . . ." The draft opinion goes on to state in Paragraph 21 that "While it would be permissible for the trustees to budget for transportation program needs in the flex fund to purchase buses or construct a bus barn under the catch-all provision of Mont. Code Ann. § 20-10-143(1)(e) (allowing "any other amount necessary to finance the administration, operation, or maintenance of the transportation program"), the trustees may not budget for or expend property taxes levied to support the transportation fund for new school construction because that is not a purpose for which transportation funding sources were raised." Next, in Paragraph 22, you conclude that "Whether or not a certain amount of square footage will be used to provide transportation services does not alter the fact that property taxes levied to support the transportation fund cannot be used for classroom construction. If a portion of the new school building will provide transportation services, it is permissible to spend 100% of the property taxes levied to support the transportation fund for those services, but for no other purpose."

Your analysis and the overall conclusions reached in the draft opinion on the use of transportation funds is significantly flawed. The statute setting forth the primary requirements and limitations on the transportation fund is § 20-10-143, MCA. Section (1) of this statute provides that, "The trustees of a district furnishing transportation to pupils who are residents of the district shall provide a transportation fund budget that is **adequate to finance the district's transportation contractual obligations and any other transportation expenditures necessary for the conduct of its transportation program.**" *§ 20-10-143(1), MCA.* Emphasis Added.

We are unsure where your reference to construction of a "bus barn" stems as this is not a term of art and is not referenced anywhere in Title 20 or elsewhere in statute. Furthermore, the language you refer to in § 20-10-143(1)(e), MCA, is very similar in nature to the language contained in § 20-7-705(4), MCA, regarding adult education funds:

- (e) "any other amount necessary to finance the administration, operation, or maintenance of the transportation program of the district, as determined by the trustees." *§ 20-10-143(1)(e), MCA.* Emphasis added.
- (4) "Whenever the trustees of a district decide to offer an adult education program during the ensuing school fiscal year, they shall budget for the cost of the program in the adult education fund of the final budget. Any expenditures in support of the adult education program . . ." *§ 20-7-705(4), MCA.*

Both statutes contain broad, flexible language in terms of the use of the respective funds for adult education and transportation (as identified above). In fact, the citation to the adult education statute above is much broader than the statute relating to expenditures for transportation, yet you conclude that adult education funds cannot be used for capital investments and expenditures, but transportation funds can be used for such investments and expenditures. Specifically, the adult education statute refers to "any expenditure in support of the adult education program," while the transportation statute refers to "any other amount necessary to finance the administration, operation, or maintenance of the transportation program." You then go on to conclude, however, that with respect to the transportation fund, that districts cannot use it for "classroom construction" but can use it to "construct a bus barn."

Again, nowhere in § 20-10-143, MCA, or any other provision in the Mont. Code Ann. does it use the reference "bus barn." As noted above, § 20-10-143(1)(e), MCA, would allow a school district to spend transportation funds to "finance the administration, operation, or maintenance of the transportation program of the district, **as determined by the trustees**." Emphasis added. This could very well, as determined by the trustees, allow a school district to allocate a portion of a school building (new construction or otherwise), salaries of staff, etc., to the transportation fund so long as such expenditure falls within this broad category. For example, if the new school building in Ennis had a parking lot devoted to school buses, if the building was constructed in a fashion where buses pulled under an overhang for the purposes of picking up and dropping off students, if the building had offices/space for transportation personnel, etc., a portion of the costs of construction of the new facility could be allocated and paid for with transportation funds. Again, it is important to point out that according to the District's auditor, 15% of the new building in Ennis was allocated to transportation and again, this information appears to be uncontested by your office.

The Draft Opinion is Void of Any Discussion on the Distinction in Law Relating to the Transfer of State Funds Versus the Transfer of Local Funds

There is also a significant issue that is not addressed in the draft opinion that impacts the ultimate conclusions reached. As acknowledged in the draft opinion, § 20-9-208, MCA, provides trustees of a school district with the authority (within certain limitations) to transfer money from one fund to another. Section 20-9-208, MCA, (as it existed prior to amendments resulting from the 2011 legislative session) provided, in pertinent part, as follows:

> (2) Unless otherwise restricted by a specific provision in this title, transfers may be made between different funds of the same district or between the final budget and a budget amendment under one of the following circumstances:

(a) (i) Except as provided in subsection (2)(a)(ii), transfers may be made from one budgeted fund to another budgeted fund or between the final budget and a budget amendment for a budgeted fund ***whenever the trustees determine, in their discretion, that the transfer of funds is necessary to improve the efficiency of spending within the district or when an action of the trustees results in savings in one budgeted fund that can be put to more efficient use in another budgeted fund.*** Transfers may not be made with funds approved by the voters or with funds raised by a nonvoted levy unless the transfer is within or directly related to the purposes for which the funds were raised. Before a transfer can occur, the trustees shall hold a properly noticed hearing to accept public comment on the transfer.

(ii) Unless otherwise authorized by a specific provision in this title, transfers from the general fund to any other fund and transfers to the general fund from any other fund are prohibited.

Section 20-9-208(2), MCA

In accordance with the § 20-9-208(2), MCA, the trustees have the authority to transfer funds other than those raised by local property tax levies from one budgeted fund to another budgeted fund if "in their discretion, the transfer of such funds would improve the efficiency of spending within the district or when an action of the trustees results in savings in one budgeted fund that can be put to more efficient use in another budgeted fund." *§ 20-9-208(2)(a)(i), MCA.* There are limitations on transfers of funds approved by the voters or with funds raised by a nonvoted levy (i.e., local funds).

The draft opinion appears to overlook this distinction between the degree of flexibility for transferring state funds (which is subject only to a finding that there is a more efficient way to spend the money) vs. local funds (which are subject to the "within or directly related to" limitation referenced throughout the opinion). In the case of the transportation fund, that fund contains state funds as well as county and school district property tax revenue. All three of these revenue sources are comingled within the transportation fund. As such, a determination regarding whether money transferred was state funds, county funds or local funds should really come back to the underlying amounts of annual revenues from those respective sources. With regard to Ennis, for example, if that district received at least $120,000 in state transportation aid in each of the years in which a $120,000 transfer of funds from the transportation fund to the flexibility fund occurred, the district has the flexibility to make the determination regarding whether the transferred amounts were state funds (requiring no limitation on spending) or local funds (which would require that the transferred funds be spent on purposes within or directly related to the purpose for which they were raised). The draft opinion concludes that the funds transferred were local, as opposed to state, and therefore subject to limitations on use. If the funds transferred from the transportation fund were state as opposed to local funds, no such limitation exists, rendering that entire portion of the opinion inapplicable.

Perhaps this would also explain why Ennis Public Schools did not, in its resolution transferring transportation funds to the flex fund as referenced in the draft opinion, make any reference to use of the transportation funds on purposes within or directly relating to the purpose for which local transportation funds were raised. This discrepancy in analysis should be resolved as there does

not appear to be any contention that the expenditures on facilities violated the purposes enumerated for expenditure of flex funds set forth in § 20-9-543, MCA, which includes, among a list of others, expenditures for "facility expansion and remodeling considered by the trustees to support the delivery of educational programs or the removal and replacement of obsolete facilities." *§ 20-9-543, MCA(1)(a)(ii).*

In summary, the conclusions reached in the draft opinion are not consistent with Montana law as follows:

- The draft opinion contradicts OPI's long-standing past practice and official interpretation of school funding statutes;
- The draft opinion contradicts the Montana Constitution and applicable statutes giving OPI and local school boards authority over administration of school finance laws;
- The draft opinion contradicts Montana law by concluding that adult education funds cannot be used for capital improvements;
- The draft opinion contradicts Montana law by placing unreasonable restrictions on the use of transportation funds;
- The draft opinion is void of any analysis on whether the transportation funds transferred by Ennis were state or local funds. Montana law allows state funds to be transferred to the flexibility account and used for any purpose set forth in statute (§ 20-9-543, MCA), including capital investments and expenditures. Montana law further allows local funds to be transferred to the flexibility account and used for the express purpose for which such funds were raised.

Should the Analysis and Conclusions Reached in the Draft Opinion be Incorporated into the Final Opinion Issued by the Attorney General's Office, the Final Opinion Should be Applied Prospectively Only

In light of the fact that in August of 2010, OPI specifically validated the use of both adult education and transportation funds for capital projects, the draft opinion should be modified to ensure consistency with the opinion of OPI. If you remain committed to an interpretation of the law that would overrule long-standing precedence to the contrary, we respectfully request that you specify that the opinion applies prospectively to actions taken after the date of its issuance. This will avoid the almost certain litigation that is likely to ensue from the opinion and the related cross complaints against the state of Montana by school districts that relied upon the long-standing interpretations and opinion of one constitutionally-empowered office (the Superintendent of Public Instruction) only to find after the fact that a new opinion of another constitutionally-empowered official (the Attorney General) places them in legal jeopardy as a result of such reliance.

As noted above, in August of 2010, OPI confirmed that both the transfer of adult education funds and transportation funds into the flexibility fund and the use of the funds for the purposes of constructing a new elementary and junior high school met the letter and spirit of the law. This opinion was not new; rather it confirmed a consistent long-standing interpretation of OPI that capital expenditures using adult education funds are appropriate. In a review of adult education fund expenditures since 1994, there are over 750 individual instances in which school districts

reported and in which OPI received, tracked and validated such expenditures on capital improvements. These same expenditures were presumably audited and found to be appropriate by numerous auditors, OPI, the Montana Department of Administration and various county superintendents, all of whom receive copies of school district audits pursuant to §20-9-203, MCA. Until the issuance of the draft opinion, no state or local agency challenged or contradicted OPI's consistent interpretation that expenditure of adult education funds on capital expenditures was lawful.

By law, OPI is the state agency that has general supervision of Montana's public schools (§ 20-3-106, MCA). As such, Ennis Public Schools and others should be expected to have reasonably relied upon the information and advice provided by OPI over the course of nearly 20 years culminating with the issuance of their official opinion in August of 2010. School districts throughout the state should not now be subject to legal challenge as a result of a fundamental contradiction between the longstanding opinion by OPI and the draft opinion issued by your office. Neither Ennis nor any other Montana public school that relied and acted upon OPI's long-standing interpretation and validation of the use of adult education funds for capital expenditures should be subject to legal challenge for the previously authorized use of adult education funds any capital expenditures.

In examining the issue of whether a decision should be applied retroactively or prospectively, the Montana Supreme Court has applied three principles. "Whether or not a judicial interpretation should be applied retroactively is a question guided by the principles enunciated in *LaRoque v. State* (1978), 178 Mont. 315, 583 P.2d 1059. In *LaRoque* we followed the factors set forth by the United States Supreme Court in *Chevron Oil Company v. Huson (1971), 404 U.S. 97, 92 S.Ct.349, 30 L.Ed.2d 296.* These considerations are as follows:

(1) The decision to be applied nonretroactively must establish a new principle of law either by overruling precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) The rule in question must be examined to determine whether its retroactive application will further or retard its operation; and

(3) The equity of the retroactive application must be considered."

Jensen v. State, Department of Labor and Industry, 213 Mont. 84, 88, 689 P.2d 1231 (1984).

Applying these principles to the current situation, any decision that is rendered by the Attorney General's Office that is inconsistent with the long-standing interpretation and previously rendered opinion of OPI, in essence, has the effect of establishing a new principle of law by either overruling OPI's interpretations or deciding an issue of first impression and any such decision from your office was not foreshadowed by prior law. As discussed above and as confirmed by OPI's August 2010 letter, neither the statutes on the use of adult education funds nor the statutes on the use of transportation funds have been interpreted in the manner as restrictive as that set out in the draft opinion. Simply put, the draft opinion creates new law. In applying the second principle, i.e., whether retroactive application of your office's final opinion will further or retard its operation, in the instant case, retroactive application of the final opinion

if it is inconsistent with OPI's long-standing interpretation that is evident by its August 2010 opinion, will significantly hinder and jeopardize any actions taken by Ennis Public Schools and any other public school in this state in reliance upon OPI's long-standing interpretations and its August 2010 decision, thereby subjecting many of our public schools and OPI to protracted and costly litigation to determine whether your analysis and conclusions are correct or whether the long-standing interpretations, analysis and conclusions reached by the OPI (with which we agree after analyzing the issues in detail) were correct. Lastly, the equity of retroactive application has to be considered. As set forth above, the inequities of a retroactive application in this matter are substantial. It is our understanding that the construction of the new elementary and junior high school has been completed or is near completion, the funds in question have already been expended and there is no simple way to undo what has already been done. Retroactive application of the opinion (should the final opinion be inconsistent with current statutes and OPI's long-standing interpretations and its August 2010 decision) to Ennis Public Schools or other public schools in this state would pose a significant, undue hardship on those impacted.

Ennis Public Schools' legal counsel, Elizabeth Kaleva, has been consulted regarding the contents of this letter and she is in full agreement with the analysis and conclusions reached herein.

Please feel free to contact us if you have any questions or need further clarification regarding our noted concerns with the draft opinion.

Sincerely,

Lance L. Melton
Executive Director

Debra A. Silk
Associate Executive Director / General Counsel

cc: Office of Public Instruction
Ennis Public Schools
Kaleva Law Offices